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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 923

JANICE WIENER, as Executrix of the Estate of Norton Wiener, Deceased, and related cases,

Petitioners,

vs.

UNITED AIR LINES, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Court of Appeals for the Ninth Circuit is now reported in 286 F. 2d 302. It is also correctly set forth as appendix "A" to the Petition for Certiorari.

Jurisdiction.

The jurisdictional requisites are correctly set forth in the Petition.

Question Presented.

Whether under the particular facts of these twenty-three consolidated actions and under the circumstances presented by the record, a separate trial on the issue of damages should be had before a new jury, different from the one which will try the consolidated actions on the issue of liability.

Federal Rule Involved.

The Petition correctly states that this matter involves Rule 42 of the Federal Rules of Civil Procedure, which rule is correctly set forth in the Petition.

Statement.

Petitioners' statement of the case is correct with the following reservations:

(1) The Petition states that it was at United's request that the District Court included in its Order consolidating the twenty-three cases on liability only, the certification that in its opinion the order involved a controlling question of law as to which there was a substantial ground for differences of opinion. This statement was made by petitioners under a mistake as to the facts and we are authorized by counsel of Petitioners to state that actually the matter was inserted in the District Court's Order without any suggestion by either party.

(2) The inference may be drawn from Petitioners' statement of the case that United opposed consolidation of the cases on the issue of liability. The record shows that United never opposed consolidation on the issue of liability and objected only to the trial of the damage issue before new juries. [R. 352-353, 364-368, Appellant's Opening Brief in the Court of Appeals for the Ninth Circuit (pp. 11-12).]

United's position has been throughout that it would be a complete waste of time to try these cases separately on the issue of liability and that there should be a consolidation on that issue, but that thereafter the jury should be retained to assess the damages in these cases, one by one, or in such groups of cases as may conveniently be tried together. Appendix "A" to this brief contains a portion of our brief before the Court of Appeals in which we stated our position, a position to which we still adhere.

(3) For reasons explained below in Respondent's argument, Respondent does not accept it as an accomplished fact that by filing "limitations" of their claims in the District Court after the decision of the Court of Appeals became final, Petitioners have effectively eliminated all claims for exemplary or punitive damages.

ARGUMENT.

I.

The Question Presented by Petitioners Is Not Involved in This Case.

Petitioners state that the question presented is the existence of a discretion in the District Court to consolidate actions for wrongful death arising out of a common disaster, where compensatory but not exemplary damages are sought.

This statement is erroneous for at least three reasons:

(1) First and foremost, the Court of Appeals expressly held that it did not and would not pass on the general question of whether such a power existed in the District Court. So that there can be no question on that score, we quote from the opinion:

> "We do not say that in no circumstances can a separate jury determine the issue of damages after another jury has determined the issue of liability, for we do not reach that question in this case. As was said in a recent case from the Seventh Circuit, 'Whether a party is deprived of a jury trial as contemplated by the Seventh Amendment when some of the issues are submitted to one jury and other issues to a second jury, is a more difficult question to resolve.' *Hosie v. Chicago & Northwestern Ry.*, 7 Cir., 1960, 282 F. 2d 639, 642. We do hold that under the circumstances presented by this appeal the issues of liability and damages, exemplary *or normal*, are not so distinct and separable that a separate trial of the damage issues may be had without injustice. The question of damages is so interwoven with that of liability that

the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial. *Gasoline Product Co. Inc. v. Champlin Co., supra.*" (Emphasis added.)

United Airlines Inc. v. Wiener, 9 Cir., 1960, 286 F. 2d 302, 306.

It is difficult to see how, in view of the express holding by the Court of Appeals that it was not necessary to rule on the broad question presented by Petitioners, it can now be argued that anything but the narrow facts of this particular case are before the Court.

(2) Further Petitioners assert that the question presented involves the exercise of discretion in ordering separate juries to pass on liability and damages where only compensatory damages are involved. While we do not concede the legal effectiveness of the so-called "Statements Re Limitation of Claims for Damages" which Petitioners have filed since the Court of Appeals denied a rehearing, we must point out that Petitioners are attempting to present this question to this Court in a posture in which it was never presented to the Courts below.

(3) Finally, we cannot agree that even now the exemplary damages have been effectively waived. In three of the cases [*Emanuel* R. 31, *Aaronson* R. 180 and *Bailey* R. 240] all plaintiffs but one are minors, represented by guardians *ad litem*. Nothing is shown to indicate that these waivers have been approved by any court.

In *Berry v. Chaplin*, 74 Cal. App. 2d 652, 169 P. 2d 442, a stipulation of the guardian *ad litem* which was approved by the trial court was held not to be binding on the minor plaintiff, because the court had not taken any evidence on it.

> "The guardian *ad litem* can neither admit anything against nor waive anything in favor of his ward, but the adversary of the infant must be required to prove his whole case." (*Ibid.* p. 658.)

In fifteen cases* the plaintiffs are personal representatives. All except *Lipson* are appointed by California courts. California Probate Code, Section 578(a), set forth in Appendix B provides for the settlement of "all claims or rights of action" given by any law with the approval of the appointing court. No such approval has ever been obtained as far as the record shows or as far as we know.

II.

The Opinion of the Court of Appeals Does Not Conflict With Any Applicable Decision of This Court.

Petitioners claim that the opinion of the Court of Appeals is in conflict with *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494.

In that case this Court said that it was not a violation of the right to a trial by jury under the Seventh Amendment to grant a new trial on the issue of dam-

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*Wiener [R. 16], *Laraia* [R. 52], *Simons* [R. 75], *Kean* [R. 81], *McKinney* [R. 88], *Kaufman* [R. 112], *Lipson* (Colo.) [R. 160], *Rhodes* [R. 166], *Rankin* [R. 173], *Kallenbaugh* [R. 179], *Frickel* [R. 234], *Rachford* [R. 255], *Munch* [R. 261], *Hight* [R. 268], *Parsons* [R. 274].

ages alone, where the trial Court's decision was free from error on the issue of liability, but that in that particular case the two issues were so interwoven that a new trial on all issues was necessary.

Rather than conflict with *Gasoline Products,* it appears to us that the Court of Appeals' opinion is entirely in accord with that case. In both cases the respective Courts find that under the particular circumstances of each case separate trials would not be fair. The only difference which we can see is that in *Gasoline Products* the Supreme Court said that there was no constitutional prohibition to a new trial on damages alone, while in the present case the Court of Appeals expressly avoided a decision on United's contention that it was unconstitutional—or at least presented a serious constitutional issue—whether such separate trials could be ordered at the outset of the litigation.

Petitioners purport to find a conflict with *Gasoline Products* in the finding of the Court of Appeals that in this particular case the issues of liability and damages are interwoven. Frankly we do not see how findings to the same effect, but arising from totally unrelated facts in two quite different types of litigation can be said to be conflicting.

Petitioners seem to feel that the opinion of the Court of Appeals is in conflict with *Gasoline Products* not because of what it says, but because of what the Court of Appeals would have said had the issue of exemplary damages not been before it. It seems hardly fair for Petitioners to claim that an opinion of the Court of Appeals conflicts with an opinion of the Supreme Court, because after the opinion is rendered Petitioners unilaterally purport to change the legal situation which was

before the Court of Appeals when it rendered its opinion. Further than that, however, Petitioners know that the fairness of separate trials, quite apart from the issue of exemplary damages, was extensively argued before the Court of Appeals, both orally and in briefs. The fact that the Court of Appeals chose to emphasize in its opinion the issue of exemplary damages certainly does not prove that the other matters before it were not considered and assessed by it. As the Petition shows (Pet. p. 5, Footnote 1), Petitioners tried to bargain with the Court of Appeals for an affirmance by offering to withdraw their claims for exemplary damages. This offer was repeated during oral argument before the Court of Appeals and in the Petition for Rehearing. Had the Court of Appeals felt that the withdrawal of exemplary damages could possibly change the posture of the case, surely there would have been some intimation to that effect from the Court, either during oral argument, in its opinion or by the granting of a rehearing.

III.

The Opinion of the Court of Appeals Does Not Conflict With Any Other Decision of Any Other Court of Appeals.

Petitioners' claim that the opinion of the Court of Appeals herein conflicts with a decision of the Court of Appeals for the Fifth Circuit in *Nettles v. General Accident F. & L. Ins. Co.*, 234 F. 2d 243. This is simply not so. In the *Nettles* case the District Court ordered a trial before a jury on the question of liability only. There is no intimation in the case that, had the jury found liability to exist, the District Court would have impaneled a different jury on the issue of damages.

After the issue of liability was submitted to the jury on interrogatories, the Court entered judgment on the verdict for defendants and ordered the actions dismissed.

It is obvious that the question of trying liability and damages to different juries never arose. There is no conflict.

IV.

The Court of Appeals Fairly Assessed the Circumstances in Connection With These Consolidated Actions and on the Basis of Its Assessment Correctly Decided That Separate Trials Before Different Juries Could Not Be Had Without Injustice.

A. Certiorari Should Not Be Granted Where the Court of Appeals Makes a Fair Assessment of the Record.

Although we submit that the opinion of the Court of Appeals was manifestly and demonstrably correct, certiorari should not be granted, even if this Court would have reached a different conclusion had it been in the place of the Court of Appeals.

National Labor Relations Board v. Pittsburgh S.S. Co., 340 U. S. 498, 503;

Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 491;

Federal Trade Commission v. Standard Oil Co., 355 U. S. 396, 400-401; and

Peurifoy v. Commission of Internal Revenue, 358 U. S. 59, 61.

B. The Decision Below Was Correct.

Petitioners do not even attack the correctness of the Court of Appeals' decision on the issue of exemplary damages.

Let us concede for the sake of argument that the hypothetical situation which Petitioners are trying to create by their waivers of exemplary damages really was before the Court of Appeals and let us examine the considerations of fairness and justice which impelled that Court to hold that in these particular cases a fair and just trial as to normal damages could not be had without injustice before a new jury.

Petitioners seem to assume that the question of the fairness of separate trials as to compensatory damages was not before the Court of Appeals and not considered by it. In fact it was extensively argued both orally and in briefs and on the basis of those arguments the Court of Appeals held that a trial as to normal damages could not be had without injustice before a new jury. Without repeating in great detail the arguments which we adduced in the Court of Appeals we would like to briefly summarize them, merely to show their nature and weight:

(1) These are not contract actions in which damages are more or less liquidated or can be impassionately calculated by resort to books of account, market values and the like. These are wrongful death cases in which the discretion of the jury in the assessment of damages is extremely broad and subject to very limited review. None can deny that in such cases the jury's discretion is more or less influenced by human emotions, known or suppressed. This human factor is necessarily present in every trial by jury and no one resents it. By the same token, however, it seems grossly unfair to stack the emotional cards in favor of one side. Take the present case: United is perfectly willing to have a jury which has heard all the evidence

assess damages against it. That is our traditional method of trying these cases. It is quite a different matter, however, to appear before a new jury, which knows nothing about the evidence on the liability issue, for "sentencing", so to speak. This new jury is simply told that United is responsible for the death of the plaintiff's father, mother, husband, wife or child. It knows nothing of the reasons for this liability. Whether exemplary damages are formally in issue is quite immaterial in such a situation. The dark suspicions of evil deeds and wanton neglect, unproven and unprovable, which will pervade the juror's minds will more than make up for the omission.

When we made these contentions before the Court of Appeals, we were not arguing in a vacuum. We directed the attention of the Court to two death cases which had been tried in the Southern District of California and in which notices of appeal to the same Court of Appeals had then been filed.* Both these cases arose out of another midair collision. A jury which had heard the evidence on liability, found liability to exist and thereafter awarded the plaintiffs $142,200.00 and $147,300 respectively. The District Court then granted motions for new trial on the issue of damages alone and when the cases were retried the verdicts increased to $315,000.00 and $425,000.00 respectively.

(2) Petitioners make certain arguments of convenience in their Petition. We do not say that all of these arguments are wholly invalid. We concede that the

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*_Anderson v. United Air Lines, Inc._, So. District of California, cause number 777-57 T;
Kehl v. United Air Lines, Inc., So. District of California, cause number 788-57 T.

service which a single jury would have to render would be relatively long, but we submit that it would not be unusually or excessively burdensome.

In the affidavit of Max F. Deutz, which is attached to the Petition, Mr. Deutz refers to the fact that 3,600 pages of depositions have been taken in these cases. We do not believe that the length of a trial can properly be measured by the curiosity and verbosity of counsel at deposition sessions.

We do not know how long this case will take to try. We believe Mr. Deutz's estimate is excessive, particularly in view of the fact that right at the present time strenuous efforts are being made to eliminate the necessity of proof as to many matters by an extensive pre-trial stipulation. Petitioners seem to feel that the total length of the trial with all issues tried to one jury may be as much as five months [Petition p. 12]. Perhaps so, but everyone knows that there have been many cases tried to juries which took much longer. The procedure suggested by United [Appendix A] would allow respites between the various verdicts and we are quite certain that somewhere in the Southern District of California the District Court will be able to find twelve jurors who are physically and mentally equipped for the task.

The fear of an undue burden on the jury is therefore, in our submission, unfounded.

On the other hand there are many reasons of convenience which must have appealed to the Court of

Appeals which dictate the retention of the same jury: An enormious amount of time will be saved in the selecting, questioning, 'challenging' and seating of one jury instead of twenty-four. Once the jury has been instructed on the law of damages under the Nevada Statutes, no repetition of the instructions will be necessary. Undoubtedly during their service they will gain a certain expertise in the assessment of damages. Much time will undoubtedly be saved just in the length of deliberations.

(3) There is also the point that if one jury, rather than twenty-three separate juries, assesses damages, all cases will be judged by the same yardstick and some of the plaintiffs will not be penalized by juries which are unduly niggardly in their verdict and United will not suffer from those which may be too generous.

(4) It is possible that some witnesses who may be called on the question of damages will also testify on the issue of liability. United raised this possibility in its opening brief in the Court of Appeals and Petitioners have never denied it. They have merely argued that United is not entitled to the fruits of impeachment on the liability issue, when the issue of damages is tried. We submit that United should not be deprived of the benefit of such impeachment and apparently the Court of Appeals agreed with us.

These then are the considerations which moved the Court of Appeals to hold that even as to normal damages justice demanded a trial of issues before the same

jury. We submit that these are valid considerations and that the Court of Appeals fairly and correctly assessed them.

V.
There Are No Valid Reasons for Granting the Writ.

The decision of the Court of Appeals is not in conflict with any decision of any other court of appeals; the Court of Appeals has not decided any important question of Federal law, but merely applied basic principles of fairness to the facts of this particular case; there is no conflict with any applicable decision of this Court and there has been no departure from the accepted and usual course of judicial proceedings. None of the reasons why a writ of certiorari should be granted are present.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RANSOM W. CHASE,
Attorney for Respondent.

HUGH B. ROTCHFORD,
OTTO M. KAUS,
Of Counsel.

APPENDIX "A."

Excerpt From Respondent's Brief Before United States Court of Appeals for the Ninth Circuit.

The issue before the Court is an exceedingly narrow one. We must emphasize at the outset that United (1) does not object to consolidation on the issue of liability; and (2) does not suggest that on the issue of damages all cases be submitted to the jury together with the issue of liability; and (3) does not suggest that all cases should be submitted to the jury on the issue of damages at the same time. We feel that to take any other position would be to encourage needless delay and waste of time on the one hand and to require impossible feats of memory by the jury on the other. The procedure which we suggest and which would at the same time be in accordance with the Seventh Amendment to the Constitution, the correct interpretation of F. R. C. P. 42(b), simple fairness, the convenience of litigants, attorneys and the Court, which would save time and take the frailties of human memory into account is this: That a jury be empanelled with alternate jurors; that the issue of liability be tried to that jury and a special verdict rendered thereon; that thereafter if the jury should find against United the various plaintiffs, in whatever order is convenient to the Court and counsel, present their cases on damages, one after the other, and that the jury return verdicts after each case is heard. If it appears desirable certain groups of cases can be tried together on the issue of damages. We would be willing

to stipulate that in the case of a juror becoming sick or otherwise unable to continue, an alternative juror may pass on damages, although as an alternate he was not called upon to vote on the issue of liability.

The issue, therefore, narrows down to this: Is it practicable, constitutional, proper under F. R. C. P. 42(b), fair to litigants or convenient to the Court to provide in advance of any trial that jurors who have not heard the evidence on the issue of liability, shall assess the amount of damages.

APPENDIX "B."

California Probate Code, Section 578a.

"Compromise, etc., claims and rights of action for death or injury: Procedure. An executor or administrator shall have power, with approval of the court which ordered his appointment, to compromise and settle all claims or rights of action given to him by any law for the wrongful death or injury of his decedent, including any action brought by him in attempting enforcement thereof. Such power shall include the giving of a covenant not to sue.

To obtain such approval or authorization, the executor or administrator shall file a verified petition with the clerk showing the amount of money proposed to be paid. The clerk shall set the petition for hearing by the court and give notice thereof by causing a notice to be posed at the courthouse of the county where the petition is filed. Such notice must be given at least 10 days before the hearing. The clerk shall also cause notice to be mailed, postage prepaid, to the heirs of the decedent as named in the petition for letters of administration or letters testamentary, at least 10 days before the hearing, addressed to them at their respective post-office addresses as set forth in said petition. [Added by Stats. 1947, ch. 527, §1.]"